

1. The relationship of employer and employee existed during the period of alleged accident.
2. The parties are covered by the Workers Compensation Act.
3. Respondent received written claim on February 12, 2004.

4. Claimant's average weekly wage is sufficient for the maximum payment depending on the date of accident.
5. No temporary total disability compensation has been paid and none is claimed.
6. There are no outstanding medical costs.
7. The parties agree claimant's permanent partial general disability is, at this time, limited to the whole person functional impairment rating.

**ISSUES**

In the December 15, 2005, Award, Judge Howard awarded claimant permanent disability benefits under K.S.A. 44-510e for a 25 percent whole person functional impairment for neck and bilateral shoulder injuries.

Respondent and its insurance carrier contend Judge Howard erred. First, they argue compensation should be denied for claimant's neck injury as written claim was not timely made. Second, they contend an award of permanent disability benefits for claimant's shoulder injuries is premature as claimant allegedly has not reached maximum medical improvement for those injuries. Consequently, respondent and its insurance carrier request the Board to reverse the December 15, 2005, Award and to remand this claim to the Judge.

On the other hand, claimant contends his neck and shoulder injuries should be treated as one accident, which resulted in a 35 percent whole person functional impairment. Accordingly, claimant asks the Board to increase his permanent disability from 25 percent to 35 percent.

The issues before the Board on this appeal are:

1. Did claimant sustain one or two work-related accidents?
2. If two accidents, did claimant provide timely written claim for his neck injury?
3. What permanent partial disability did claimant sustain?
4. Should Dr. Carabetta's report or testimony be excluded from the record?

**FINDINGS OF FACT**

After reviewing the record and considering the parties' arguments, the Board finds:

Claimant alleges he injured his neck and shoulders on May 15, 2002, and each workday through September 30, 2005, which was the last day he worked before his regular hearing testimony. Conversely, respondent and its insurance carrier contend claimant sustained two injuries – a neck injury that occurred on May 15, 2002, followed by shoulder injuries that occurred from a series of repetitive traumas as he continued to work.

Claimant worked for respondent as a machine technician attendant, which required him to perform heavy manual labor. On May 15, 2002, he felt something pull in his neck as he was bending and raking wet fiberglass material from under some equipment. Claimant described the incident, as follows:

I was raking wool from underneath the line with a 15-foot rake pulling the wool where the hogelator knock the wool onto the floor underneath the line, throwing the rake underneath the line to the east side of the line pulling it back to the west side. When I was pulling it back by the third or fourth time, I felt something pull down through from my neck -- from my shoulder through my neck through my back and something pulled and I was too late. A knot rose up in part of my shoulder. It rose up as big as my fist. I knew then I should go to the medical center and report it.<sup>1</sup>

Claimant's testimony is uncontradicted that the rake he was using was 15 feet long and weighed from 35 to 45 pounds. In addition, the wet fiberglass material he would rake would weigh from 10 to 30 pounds, depending on how much he would catch.

Claimant promptly reported the May 15, 2002, incident to his supervisor. And although he injured himself at the start of his shift, he was able to complete that shift. According to claimant, his initial symptoms were in the left side of his neck and left shoulder. But within a day or so, his right shoulder also hurt.

Respondent first provided claimant with massages and ointment. But after several days, respondent referred claimant to the company doctor, Dr. Timothy Kloiber. The doctor prescribed physical therapy, which claimant commenced in July 2002. Dr. Kloiber also sent claimant for an MRI and to see a neurosurgeon, Dr. Stephen Reintjes. Dr. Reintjes found a ruptured disc and offered claimant surgery. Claimant initially thought he wanted the surgery, but he later changed his mind.

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<sup>1</sup> Continuation of R.H. Trans. at 17.

Despite his symptoms following the May 2002 incident, claimant continued working for respondent. Claimant believes the symptoms in his neck and shoulders have worsened. And he now experiences shooting pains that travel from his left shoulder through his arm and into his fingers. He also experiences numbness and tingling down both arms into his hands. But despite those ongoing symptoms, claimant has missed no time from work.<sup>2</sup> And he continues to perform his regular job duties while working seven days a week. September 30, 2005, was the last day claimant worked before testifying in this claim.

In early October 2005, claimant testified he last saw Dr. Kloiber for his neck and shoulder injuries approximately two and one-half years ago.<sup>3</sup> And at that time the doctor told claimant he did not have any additional treatment to offer claimant, other than surgery.

Claimant's attorney hired Dr. Edward J. Prostic, who is a board-certified orthopedic surgeon, to examine and evaluate claimant for this claim. The doctor saw claimant in June 2004 and concluded that he should have another MRI of his cervical spine to determine if he had cervical spinal stenosis that might be operated. In addition, the doctor concluded claimant had evidence of rotator cuff disease in both shoulders. The doctor was also concerned that claimant may be developing cervical myelopathy, or pressure on the spinal cord, due to his cervical spinal stenosis. Finally, the doctor recommended that claimant should avoid significant lifting, avoid use of his hands at or above shoulder height, and avoid use of vibrating equipment.

Dr. Prostic saw claimant again in late November 2004. At that visit, claimant advised the doctor that his shoulders were worsening but his neck seemed somewhat improved. The doctor concluded claimant's work activities had aggravated his cervical disc disease, that he has rotator cuff disease in both shoulders and that he may be developing cervical myelopathy. The doctor related claimant's injuries to the "lifting, pushing, pulling, and other forceful activities he does at work."<sup>4</sup>

Dr. Prostic believes claimant may need surgery to his neck and both shoulders. And if he does not undergo surgery, the doctor believes claimant may need anti-inflammatory and analgesic medicines; strengthening exercises for his shoulders; intermittent heat, ice

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<sup>2</sup> *Id.* at 23.

<sup>3</sup> *Id.* at 38.

<sup>4</sup> Prostic Depo. at 13.

and massage; intermittent physical therapy; intermittent epidural injections; and intermittent steroid injections to his shoulders.<sup>5</sup>

In evaluating claimant, Dr. Prostic had x-rays and an MRI that indicated claimant had moderate central disc herniation at C5-6 with some stenosis, a smaller disc herniation at C4-5 and bulging at both C3-4 and C6-7. X-rays also indicated claimant had osteophyte formation at the anterior/inferior acromion bilaterally with demineralization of the greater tuberosity. In short, he had bone spurs that were capable of injuring the rotator cuffs. Moreover, the demineralization is indicative of chronic rotator cuff disease. The doctor, however, recognized that claimant's symptoms were compatible with either severe tendinopathy or actual tears of the rotator cuff. Additional imaging studies with MRI or arthrograms would better define claimant's actual problem.

According to Dr. Prostic, claimant has a 15 percent whole person functional impairment due to his cervical radiculopathy and a 20 percent impairment to the upper extremity for each shoulder (which equates to a 12 percent whole person impairment for each shoulder), which combine for a 35 percent whole person impairment. Dr. Prostic allegedly used the *AMA Guides*<sup>6</sup> (4th ed.) to rate claimant. But the doctor acknowledged those *Guides* do not address how to rate a shoulder for weakness, which was the predominant problem.<sup>7</sup>

Dr. Vito J. Carabetta, who was selected by the Judge to evaluate claimant and who is board-certified in physical medicine and rehabilitation, also testified in this claim. Dr. Carabetta examined claimant in March 2005 and agreed with Dr. Prostic that claimant sustained a 15 percent whole person impairment due to his neck injury. But Dr. Carabetta was unable to confirm that claimant had rotator cuff disease as suggested by Dr. Prostic.

Dr. Carabetta thought claimant might have some tendinitis in his shoulders or, perhaps, partial tears in his rotator cuffs. But because the shoulder complaints were never addressed or treated, Dr. Carabetta said it was ludicrous to attempt to rate the shoulders as the condition might resolve. The doctor generally suggests that claimant might be treated with physical therapy, anti-inflammatory medications or a cortisone injection. And if that treatment did not work, the doctor suggests an MRI and, perhaps, decompression surgery.

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<sup>5</sup> *Id.* at 14, 15.

<sup>6</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

<sup>7</sup> Prostic Depo. at 23, 24.

According to Dr. Carabetta, without an MRI or arthrogram it is difficult to differentiate between arthritis, bursitis, tendinitis and a partial rotator cuff tear in the shoulder. And without those diagnostic tests, it is not possible to make an absolute diagnosis. Moreover, claimant's cervical radiculopathy further complicates the diagnosis.

Dr. Carabetta did not rate claimant's shoulders as the doctor concluded claimant had not reached maximum medical improvement as he had not received treatment for those injuries. Moreover, the doctor does not think the specific problem has been identified and that it would be inappropriate at this time to rate the impairment to claimant's shoulders. The doctor testified, in part:

Q. (Mr. Kolich) So are you saying it would be speculative to try to assess an impairment rating at this point?

A. (Dr. Carabetta) It's more than speculative. I think it's inappropriate medically speaking. It takes a cavalier attitude in terms of the medical/legal process and it ignores the medical needs of the patient.<sup>8</sup>

But the doctor indicated that claimant's bilateral shoulder condition might be as good as it is going to get without receiving a regimen of medical treatment.<sup>9</sup>

Dr. Carabetta disagreed with the manner in which Dr. Prostic used the *Guides* in rating claimant's shoulders due to his loss of strength. Dr. Carabetta pointed out that claimant's loss of strength could be due to either the cervical injury or a mechanical problem in claimant's shoulders from either bursitis or tendinitis; and besides, if this is a rotator cuff problem, a medical examiner should not address that problem from a neurologic perspective as did Dr. Prostic.

Dr. Carabetta disagrees with Dr. Prostic that claimant should undergo bilateral shoulder surgery at this point as claimant should first undergo tests and try other forms of treatment. Assuming claimant underwent bilateral shoulder surgery and assuming the worst case scenario is that a distal clavicle resection arthroplasty procedure was performed, Dr. Carabetta said the *Guides* would rate claimant's impairment at 12 percent to the whole person. And combining that 12 percent rating with the 15 percent whole person impairment for the cervical spine would yield a 25 percent whole person impairment.

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<sup>8</sup> Carabetta Depo. at 12.

<sup>9</sup> *Id.* at 21.

In summary, Dr. Carabetta believes claimant's shoulder symptoms are being caused by arthritic changes in the shoulders that occur with wear and tear over several years, which starts impinging on the rotator cuff tendons. The doctor further opined that claimant's shoulder problems were related to his work as claimant does a lot of overhead reaching.

The doctor concluded claimant's neck injury occurred on May 15, 2002. Moreover, Dr. Carabetta did not believe claimant sustained an ongoing injury to his neck after that date.<sup>10</sup>

#### CONCLUSIONS OF LAW

- 1. Should claimant's injuries be treated as one series of accidents involving his neck and shoulders? Or, in the alternative, should claimant's injuries be treated as a separate injury to his neck followed by a separate injury to his shoulders?**

The Judge determined claimant's injuries should be treated as one accidental injury as the Judge entered one award of permanent disability benefits for a 25 percent whole person functional impairment, which combined the ratings from both claimant's neck and shoulder injuries.

The Board concludes claimant injured his neck on May 15, 2002, when he was raking wet fiberglass. The evidence does not establish that claimant sustained further injury to his neck due to his work activities after that date. Conversely, the Board concludes claimant sustained a series of repetitive traumas to his shoulders that culminated in bilateral shoulder injuries as a result of the reaching that he performed at work. Consequently, claimant has sustained two work-related injuries – the first to his neck and the second to his shoulders.

May 15, 2002, is the date of accident for claimant's neck injury. But the date of accident for claimant's bilateral shoulder injuries is less clear as claimant continues to work for respondent performing his regular work duties.

For repetitive trauma injuries, the Workers Compensation Act designates the accident date to be the date the authorized physician prohibits the worker from working or the date the physician restricts the worker from performing the work that caused the repetitive trauma injury. K.S.A. 2005 Supp. 44-508(d) provides, in part:

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<sup>10</sup> *Id.* at 18.

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition.

But if the authorized physician neither prohibits nor restricts the worker from performing the injurious work, the designated date of accident is the earliest of (1) the date the worker gives the employer written notice of the injury or (2) the date the condition is diagnosed as work-related, if that information is communicated to the worker in writing. And in the event none of the above criteria are met, the accident date shall be based upon the evidence.

In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.<sup>11</sup>

The parties stipulated February 12, 2004, was the day that claimant made written claim for his injuries. That written claim would also constitute written notice. Accordingly, based upon the various criteria set forth by the Act, February 12, 2004, is designated as the date of accident for claimant's bilateral shoulder injuries.

**2. Did claimant provide respondent with a timely written claim for benefits related to his neck injury?**

The Workers Compensation Act requires a worker to provide the employer with a written claim for benefits within either 200 days of the accident or 200 days of the last payment of compensation.<sup>12</sup> But that time period may be extended to one year when the employer fails to file a required accident report with the Division of Workers Compensation.<sup>13</sup> Nonetheless, the Act requires accident reports to be filed only when the employer has knowledge of the accident and the worker's injuries "are sufficient wholly or

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<sup>11</sup> K.S.A. 2005 Supp. 44-508(d).

<sup>12</sup> K.S.A. 44-520a.

<sup>13</sup> K.S.A. 44-557(c).



partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.”<sup>14</sup>

The evidence fails to establish that the time period for serving written claim was extended beyond 200 days. Accordingly, the Board concludes claimant has failed to prove he filed a timely written claim upon respondent for his May 2002 neck injury. As indicated above, the parties stipulated that February 12, 2004, was the day that claimant served written claim on respondent. That day, however, is more than 200 days after the May 15, 2002, accident. Moreover, claimant has failed to prove that February 12, 2004, was within 200 days of the last time that he received medical treatment, or any other compensation, before that date.

Consequently, claimant's request for benefits for his neck injury must be denied.

**3. What permanent partial disability did claimant sustain as a result of his bilateral shoulder injuries?**

The Board concludes claimant sustained permanent injury to his shoulders. Dr. Carabetta elected not to rate claimant's shoulders. Consequently, Dr. Prostic's rating is the only rating in the record. As indicated above, Dr. Prostic determined claimant sustained a 20 percent impairment to each upper extremity, which converts to a 12 percent whole person functional impairment for each shoulder. Combining those ratings under the conversion chart set forth in the *AMA Guides* (4th ed.) yields a 23 percent whole person functional impairment.

As claimant continued to work for respondent at the time of the regular hearing, he based his claim for permanent partial general disability benefits on his functional impairment rating. Consequently, the Board concludes claimant is entitled to receive permanent partial general disability benefits under K.S.A. 44-510e for a 23 percent whole person functional impairment.

Should claimant's disability change, the parties may apply for review and modification of the award under K.S.A. 44-528.

**4. Should Dr. Carabetta's report or testimony be excluded from the record?**

Claimant has challenged the medical report Dr. Carabetta provided to the Judge at the Judge's request as well as certain parts of the doctor's testimony. The Board concludes those challenges are without merit. First, independent medical reports

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<sup>14</sup> K.S.A. 44-557(a).

requested by an administrative law judge are admissible under K.S.A. 44-516, which provides:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. *The report of any such health care provider shall be considered by the administrative law judge in making the final determination.* (Emphasis added.)

Citing K.S.A. 44-515, claimant also challenged certain portions of Dr. Carabetta's testimony, because the information was not previously disclosed in a report that was provided within 15 days of the doctor's examination. The Board concludes that K.S.A. 44-515 is not applicable as the statute pertains to examinations requested by an employer. And, as indicated above, Dr. Carabetta examined claimant at the Judge's request.

### **AWARD**

**WHEREFORE**, the Board modifies the December 15, 2005, Award entered by Judge Howard.

Oveal McConnell is granted compensation from Owens Corning Fiberglass and its insurance carrier for a February 12, 2004, accident and resulting disability. Mr. McConnell is entitled to receive 95.45 weeks of permanent partial general disability benefits at \$440 per week, or \$41,998, for a 23 percent permanent partial general disability, making a total award of \$41,998, which is all due and owing less any amounts previously paid.

For his shoulder injuries, claimant is entitled to unauthorized medical benefits up to the statutory maximum.

Future medical benefits for claimant's shoulder injuries may be considered upon proper application to the Director.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant  
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director